**Held,** that police supervision could only be imposed when a substantive sentence of imprisonment was also imposed.

CRIMINAL REVISION.

*T. D. Wallace,* Deputy Public Prosecutor, as *amicus curiae.*

**Horne, J.**—The sentences imposed in these cases have been brought to the notice of the Court.

The sentence is as follows:—

"Fine $10/- or 14 days and one year's police supervision."

It is quite clear from section 295 (i) of the Criminal Procedure Code that police supervision can only be imposed when a substantive sentence of imprisonment is also imposed.

The concluding words of the sentence—

"supervision of the police for a period of not more than three years commencing immediately after the expiration of the sentence passed on him for the last of such offences"—

show that "any other punishment" occurring earlier in the sentence must be construed as a punishment by imprisonment only.

The sentences in these cases must be varied by quashing the order of police supervision.

*Order for police supervision quashed.*

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[APPELLATE CRIMINAL JURISDICTION]
COURT OF APPEAL.

POYSER, C.J. (F.M.S.), McELWAINE, C.J. (S.S.) & TERRELL, J.A. (MALAYA).

March 3, 1939.

## NG LAM v. PUBLIC PROSECUTOR.

[NEGRI SEMBILAN CRIMINAL APPEAL No. 87 of 1938]

*Penal Code (c. 45) S. 302—Murder—Defence of statutory exception—Extent of burden cast on Defence.*

In a trial for murder it is the duty of the prosecution to prove beyond reasonable doubt the prisoner's guilt and the burden of proving the existence of circumstances bringing the case within any statutory exception lies upon the prisoner although the burden on the prisoner is very much less than that on the prosecution and amounts only to stablising a balance of probability in his favour.

Decision of **Woolmington v. Director of Public Prosecutions** (1935) A.C. 462 explained.

Cases referred to:—

(1) *Chia Chan Bah v. The King,* 7 M.L.J. 147; (1938) S.S.L.R. 223.

(2) *Public Prosecutor v. Alang Mat Nasir bin Anjang Talib and Chen Lip,* 7 M.L.J. 153 (1938) F.M.S.L.R. 47.

(3) *R. v. Chhui Yi,* 5 M.L.J. 177, (1936) S.S.L.R. 129.

(4) *Sodeman v. Rex,* (1936) 2 All E. R. 1138.

(5) *Woolmington v. Director of Public Prosecutions* (1935) A.C. 462.

CRIMINAL APPEAL.

*John L. Woods,* for the Appellant.

*T. V. A. Brodie and J. F. Draper,* for the Public Prosecutor.

*Cur. Adv. Vult.*

The Judgment of the Court of Appeal **(Poyser, C.J. (F.M.S.), McElwaine, C.J. (S.S.) & Terrell, J.A.)** was as follows:—

This case has been very fully argued. The evidence abundantly established that the appellant committed culpable homicide but it is argued that had there been a proper direction to the assessors they might have found that the accused, when he killed the deceased, only exceeded the right of defence of property or of his person or acted under grave and sudden provocation.

Mr. Woods argued that the Judge was wrong in telling the assessors that "the burden is on the accused to prove the existence of circumstances bringing the case within any exception" although he also told them that "the Prosecution must prove by positive evidence beyond any reasonable doubt the guilt of the accused. The burden on the accused is very very much less. He is entitled to protection from any evidence whatsoever either from evidence led by the prosecution or that led by himself and the burden on him may fairly be stated to be equivalent to the burden on a plaintiff in a civil suit, and the rule in a civil suit is that a plaintiff or a defendant has discharged the onus of proof which lies upon him if he established a balance of probability in his favour."

This summing up indicates that the learned Judge had in mind *Sodeman v. Rex*(4) and *Chia Chan Bah v. The King*(1).

Mr. Woods, however, argued that this latter case put the onus on the accused too high and that *Public Prosecutor v. Alang Mat Nasir bin Anjang Talib and Chen Lip,*(2) was the more correct decision.

Mr. Woods' argument was that it is enough for the accused to raise a doubt as to whether he came

within an exception to section 300 of the Penal Code but that it was unnecessary for him to prove even in the *Sodeman* sense that he did come within it.

Of course, if the evidence raises any doubt as to the Crown case, the accused must have the benefit of that doubt.

Section 105 of the Evidence Enactment says:—

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Illustration (b):—

> "A. accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control. The burden of proof is upon A."

The argument for the appellant was in short that an accused person proves that he comes within an exception if he raises a doubt whether he does or not and that it is not necessary for him to prove that he even probably comes within an exception; and that the statement in *Chia Chan Bah's case*[1], "It is sufficient if he tips the scale of probability in his favour —if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane" puts too heavy an onus on an accused.

We were referred to *Woolmington's case*[5]. That case decided that a direction "once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less" was a bad direction.

Such a direction "once it is shewn that some one has died through the act of another, that is presumed to be murder" would certainly be a bad direction under section 300 of the Penal Code which emphasises the intention with which the act is done. A bare killing is neither murder nor culpable homicide not amounting to murder in the absence of intention.

The defence in *Woolmington's case*[5] was "accident". If the killing was accidental, it certainly was not murder but the jury was in effect told that a mere killing was murder "for the law presumeth the fact to have been founded on malice, unless the contrary appeareth".

That was the defect in the *Woolmington case*[5] which led to the quashing of the conviction. "When intent is an ingredient of a crime, there is no onus on the defendant to prove that the act alleged was accidental". That, we believe, is the law of the Federated Malay States.

Attempts have been made to push the decision in *Woolmington's case*[5] much farther than that decision goes. It is sufficient for this case to cite the well known passage "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exceptions". We do not understand these words to mean that there is no onus on an accused to prove a statutory exception when an intentional killing has been proved. As it was put in *Rex v. Chhui Yi*[4] "*Woolmington's case*,[5] can be no authority for saying that the onus is always on the Crown of negativing *ab initio* every one of those possible exceptions, of proving affirmatively in every case, for example, that the accused was acting under no mistake of fact, was over seven years of age, was not so drunk as to come within sections 85 and 86, was not acting in self defence, had suffered no provocation, was sane and so forth".

It is extremely doubtful whether the deceased at any time contemplated an offence against property. We do not think his surreptitious presence near the house in which the woman Chai Tong lived amounted to an attempt to commit an offence mentioned in section 103 or 104 of the Penal Code. Even if it did, the right had ceased when the deceased fled from the place and it is clear from the evidence that he was killed in flight after he had gone some distance from the house.

There remains the question of provocation The Judge drew attention to the defence of grave and sudden provocation.

Taking the summing up as a whole, the Judge repeatedly told the assessors that the burden of proving the offence of murder was on the prosecution and that they had to review the whole of the evidence to see if there are any mitigating circumstances which would reduce the offence from murder to a lesser offence. He also told them that the benefit of any reasonable doubt must be given to the accused.

The appeal is dismissed.

*Appeal dismissed.*